Petition

81-394
No. _____

Office-Supreme Court, U.S.
FILED
AUG 18 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN DI GILIO,
Petitioner.

-vs-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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AREA CODE 609
443-4202

Questions Presented

1. Whether the construction of Fed.R.Crim.Proc. 33 as precluding the grant of a new trial on the basis of newly discovered evidence where the proffered evidence is of the impeachment variety is violative of the fifth amendment right to due process and the fourteenth amendment right to equal protection?
2. Whether the District Court misclassified the newly discovered evidence proffered by petitioner as impeachment evidence since as opposed to merely detracting from the witness' account it indicated that the witness testified falsely?
3. Whether a finding of false testimony by government witnesses respecting material issues at trial mandates the grant of a new trial?
4. Whether a hearing must be conducted in circumstances where a court is informed that newly discovered evidence placed under seal and deposited in its chambers has disappeared?

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Opinion Below

The Judgment Order of the United States Court of Appeals for the Third Circuit is appended to this Petition as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Third Circuit is based on 28 U.S.C. Sec. 1254(1).

Constitutional, Statutory and Rule Provisions Involved

Petitioner seeks review of issues of law arising under the Fifth and Fourteenth Amendments to the United States Constitution and Fed.R.Crim. Proc. 33. They are appended to this Petition as Appendix B.

Order Extending Time To File Petition for Certiorari

An application was made to Associate Justice William Brennan, Jr. seeking an extension of time within which petitioner could timely file the within petition for certiorari. On July 21, 1981 Justice

Brennen issued an order extending the time until August 18, 1981. Justice Brennan's order is appended as Exhibit C.

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN DI GILIO,
Petitioner.

-vs-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 20, 1981.

Statement Of The Case

I.

Procedural Background

On August 6, 1974 United States District Court, District of New Jersey Indictment No. 74-314 was filed. That indictment charged petitioner with: conspiracy in violation of **18 U.S.C.A. Sec. 371** (Count One) and conversion of records of the United States valued in excess of $100.00 in violation of **18 U.S.C.A. Sec. 641** (Count Two). Trial of the offenses was conducted before the Honorable H. Curtis Meanor and a jury in June and July of 1975. On July 30, 1975 petitioner was convicted of both offenses. On September 12, 1975 Judge Meanor imposed a sentence upon petitioner of nine years imprisonment and a $10,000 fine on Count Two and a concurrent term of five years imprisonment on Count One. On appeal to the Third Circuit, petitioner's conviction on Count Two was reduced to conversion of property valued at less than $100.00, a misdemeanor. See **United States v. DiGilio, 538 F.2d 972 (3 Cir. 1976), cert. den. 429 U.S. 1038 (1977).** Thereafter, on December 14, 1979 Judge Meanor sentenced petitioner to a term

of imprisonment of nine months and a $1,000 fine on Count Two (conversion) and to a $1,000 fine on Count One (conspiracy).* On October 30, 1980 petitioner moved before Judge Meanor for a new trial on the ground of newly discovered evidence. On November 10, 1980 petitioner's motion was denied. On May 20, 1981 the Third Circuit affirmed the decision of the district court.

II.

Factual Background

A. The Alleged Instigation By Petitioner Of Thefts Of Documents Maintained By The Federal Bureau Of Investigation And The Clear Evidence To The Contrary.

In March of 1971 George Kuczynski began to offer for sale confidential documents prepared and maintained by the Newark office of the Federal Bureau of Investigation (hereinafter "F.B.I."). (T1663-59). The documents were photostated copies of original materials maintained by the F.B.I. Kuczynski at the time that he commenced marketing F.B.I. documents was romantically involved with a

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* Petitioner has served that sentence and been released.

clerical employee of that agency, Irene Klimansky. Prior to trial Kuczynski and Klimansky formalized their relationship into a marriage. During their courtship, Klimansky was convinced by Kuczynski to steal F.B.I. documents for his use. Kuczyski approached Klimansky because he had been unsuccessful in his attempts to break into the F.B.I. office. The form of persuasion which motivated Klimansky's ultimate participation was infliction by Kuczynski of savage beatings upon her. (T318, 321, 384).* Klimansky's subsequent consent to marriage, after the form of treatment accorded her by Kuczynski, is evidentiary of her weak character.

Klimansky was instructed to purloin specific documents embodying information compiled on petitioner and others. Although the evidence indicated that "the documents were being peddled around town and that others besides [petitioner] had been approached by Kuczysnki about purchasing them", it was the government's theory at trial that petitioner instigated Kuczysnki's actions. See, **United States v. DiGilio, 538 F.2d 972, 979 (3 Cir. 1976), cert. den. 429 U.S. 1038 (1976).** In this context, it

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* T = Transcript of Trial.

is interesting to note that Kuczynski allegedly maintained an inventory of documents relating to petitioner which he separated into components to proliferate the number of transactions and thereby multiply his opportunities for profit. Stated somewhat differently, Kuczysnki did not provide documents to petitioner as he received them. Kuczynski stockpiled his wares and parceled them out. Petitioner allegedly paid a total of $1,000 to Kuczysnki for the various deliveries of documents.

Several witnesses testified at trial that Kuczynski approached them to market the documents. (T1890 to 1900). The testimony of these witnesses with respect to the temporal posture of the approaches clearly undermined the credibility of Kuczysnki particularly regarding the claim that petitioner instigated the conduct. The alleged instigation of the conduct was the gravamen of the offense. Therefore, any dimunition of the value of Kuczynski's conduct was highly probative to the point of being exculpatory. Kuczysnki and Klimansky testified that they opened shop in the Fall of 1971 and terminated the business in the Spring of 1972. Prior statements provided by Kuczynski and

Klimansky to the F.B.I. were inconsistent with the testimony both with respect to the time span of the operation and the number of actual thefts. Klimansky and Kuczynski had previously stated that the initial theft occurred in January of 1972 and the last theft occurred in June of 1972. (T151; 1159; 418; 421; 431; 432). Defense witnesses testified that Kuczysnki began his approaches to them as early as November of 1971 and the approaches continued through April of 1974.

The testimony at trial of George Weingartner was of critical relevance to any determination of the nature of petitioner's involvement. Weingartner was approached by Kuczysnki in March of 1971. Kuczynski displayed F.B.I. documents to Weingartner. (T1658-59). Kuczynski approached Weingartner again in April of 1974. Kuczynski informed Weingartner at the April 1974 meeting, as part of his demonstration that he continued to be privy to F.B.I. files, that F.B.I. agents operating a white panel truck with the name "Rizzo Caterers" appearing on its side were assigned to surveil both him (Weingartner) and petitioner. (T1704; 1810-11). Kuczynski even provided to Weingartner the license

plate number of the truck. However, prior to trial Weingartner misplaced the piece of paper and was unable to produce it for use at trial. (T1704). The relevance of the piece of paper, other than to corroborate Weingartner's account of his meeting with Kuczynski, was to counteract the testimony of F.B.I. agent Wayne Comer and Kuczynski. Agent Comer stated that the F.B.I. did utilize a white panel truck with "Rizzo Caterers" appearing on the side as a subterfuge. (T2093). The agent, however, denied that the truck was utilized in April of 1974. (T8093-95). Comer also testified that the F.B.I. had no relationship with Kuczynski in April of 1974 when Kuczynski provided the information concerning the truck to Weingartner. As noted, Kuczynski testified that he terminated his activities in the Spring of 1972 and that he had not received information at any time as part of a favorable relationship with the F.B.I. All information which he generated, claimed Kuczynski was the result of the thefts during 1972. That testimony is contrary to his approach of Weingartner in 1974 with information concerning a currently operative surveillance vehicle. Kuczynski and Comer, therefore, testified adversely to Weingartner and the

jury believed their testimony. Petitioner was convicted exclusively on the basis of this testimony. Had Weingartner been believed, the jury at most could have concluded that petitioner purchased documents. Contradiction of Comer and Kuczynski would have precluded any finding that he instigated the thefts. Indeed, the jury may have totally disbelieved Comer and Kuczynski and found that defendant had no involvement whatsoever.

B. Receipt Of A Tape By Weingartner Marked F.B.I. and Dated April 2, 1974

Subsequent to petitioner's trial, Weingartner was given a tape recording marked F.B.I. and dated April 2, 1974. The tape was given to Weingartner by the late Vincent Capone. As part of his delivery of the tape, Capone stated to Weingartner that the contents of it might be helpful to petitioner with respect to a pending motion for new trial. Weingartner listened to the tape but could not decipher its contents. The listening equipment which Weingartner possessed was too unsophisticated to overcome the poor audibility of the tape. Weingartner, thereafter, put the tape in storage in his home

with no knowledge as to its contents.

C. Rediscovery Of The Missing Piece Of Paper And Its Disappearance While In The Custody Of The Court.

In July of 1978, F.B.I. agents searched the residence of Weingartner and seized various items. As part of their thorough search of the premises, the F.B.I. found the piece of paper upon which Weingartner previously recorded the license plate number related to him by Kuczynski pertaining to the F.B.I. surveillance vehicle. The F.B.I. seized inter alia the piece of paper and the tape which Weingartner previously received from Capone. The items seized from Weingartner's home were placed under seal by Magistrate Serena Paretti pending disposition of a challenge to the search raised by Weingartner. On May 7, 1980 Weingartner, as part of the challenge, successfully secured an order of the court for return of the piece of paper. Weingartner, thereafter, traveled to the District Court Clerk's Office to retrieve this item. The Clerk did not have the item in his possession. A subsequent visit to Judge Meanor's chambers revealed that he was in custody of the expansion folders in which

the document was previously sealed and stored. An examination of the folders indicated that the document was missing. Succinctly stated, the piece of paper, seized by the F.B.I. and placed under seal by the Court, had disappeared from within Judge Meanor's chambers. Thus, it is a fair assumption that the item placed under seal by the Court was either misplaced, stolen or destroyed.

D. The Successful Hearing Of The Tape And Its Contents

In July of 1980, the court ordered that the tape be returned to Weingartner. Subsequently, Weingartner renewed his attempts to decipher the tape. He secured sophisticated listening equipment and played the tape. The tape embodied recordings of transmissions from the F.B.I. undercover van on April 2, 1974. The tape revealed that notwithstanding F.B.I. Agent Comer's statements under oath to the contrary, the truck was operated in April of 1974 with the specific purpose to surveil petitioner.

E. Petitioner's Motion For A New Trial And The District Court's Denial Of It Without An Evidentiary Hearing.

In October of 1980, petitioner moved for a new trial on the ground that newly discovered evidence would have a substantial impact on the outcome of trial. Specifically, petitioner argued that the materials embodied in the tape and the piece of paper prepared by Weingartner would have permitted his trial counsel to present to the jury credible evidence indicating that Agent Comer was an unreliable if not perjurious witness whose testimony should be disbelieved in its entirety, particularly, those portions pertaining to the relationship which he had with Kuczynski. So too, argued petitioner, Kuczynski's testimony was unreliable because he also denied any significant personal relationship between himself and the F.B.I. during the period of time covered by the indictment. Since the only evidence that petitioner instigated any thefts came from Kuczynski, impeachment of him had the effect of adducement of substantive exculpatory evidence. In denying the motion without an evidentiary hearing, the District Court stated:

> I have been on this bench for a little over six years. I think for five and a half of them I have dealt with [petitioner]. I hope that this is the last time I as a judge have to deal with [petitioner]...We do not grant new trials on newly discovered evidence where the evidence is only collateral, is merely impeaching or corroborating...it goes only to credibility and it involves a completely collateral matter. [TM24 to 50]*

The District Court, thus, denied the motion stating that the newly discovered evidence was merely impeaching. We emphasize that the Court was wholly unconcerned that items of evidence previously placed under seal disappeared while being stored within its chambers. It would seem that any court would be startled and dismayed at such an occurrence and be constrained to immediately order a full inquiry. The District Court, however, since it did not perceive the relevance of the missing piece of paper was wholly uninterested in investigating its disappearance.

In a judgment order, the Third Circuit affirmed the decision of the District Court.

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* TM = Transcript of Motion.

iii.

The Jurisprudential Significance Of The Arguments To Be Raised Before This Court

Petitioner has selected three issues to be raised before this Court. These issues relate to: (1) the principle of law that a motion for a new trial on the ground of newly discovered evidence must be denied if the evidence is merely impeaching; (2) mischaracterization by the district court of the newly discovered evidence in this case as being merely impeaching and (3) the failure of the district court to conduct a hearing in circumstances where it was informed that a portion of the evidence disappeared while in the custody of the court pursuant to an order placing it under seal. We believe that each of these issues has national significance in the context of development of fair and uniform application of the law in a manner designed to ensure the constitutional integrity of verdicts in criminal cases. These claims are outlined below and detailed in the reasons for granting the writ.

a. Preclusion Of A New Trial Because The Evidence Is Merely Impeaching.

The law respecting newly discovered evidence, as presently constituted, is violative of the Fifth Amendment right to due process and the Fourteenth Amendment right to equal protection of the law. The rule of law in the majority of federal circuits is that a motion for new trial on the ground of newly discovered evidence must be denied if the evidence consists entirely of impeachment material. The District Court and the Third Circuit relied on this axiom in denying relief to petitioner. The prevailing view, relied on below, is inconsistent with experience and reality. Impeachment evidence, depending upon the circumstances of a particular case, has the capacity to determine the outcome of a trial. Stated somewhat differently, guilt or innocence is often determined on the basis of the believability of a particular witness. To that extent, impeachment evidence in terms of its importance and impact may not be rationally distinguished from other forms of evidence. It is our position that any construction of Fed.R.Crim.Proc. 33 which precludes a new trial on the basis of newly discovered evi-

dence if such evidence is impeachment evidence is violative of both due process and equal protection, since it denies a new trial to certain defendants on the basis of the classification of evidence as opposed to any determination of its impact. Defendants who are able to have a court include their new evidence within the classification of substantive evidence qualify for consideration for a new trial although the actual impact of the evidence may be no more substantial than impeachment evidence offered by another defendant. This Court must issue a firm statement of law forbidding this irrational and arbitrary classification which dispenses justice in disparate fashion.

b. Mischaracterization Of The Evidence Below As Being Merely Impeachment Evidence.

The District Court mischaracterized the newly discovered evidence in this case as "merely impeaching." The evidence offered by petitioner related to the government's proofs respecting his role in the theft of F.B.I. documents. It was the government's theory that petitioner instigated the thefts. Adoption of this theory was essential to a jury finding that petitioner was guilty of theft and conspiracy. The

newly discovered evidence, viz. the missing piece of paper and the tape, tended to demonstrate that there existed a collusive relationship between the F.B.I. and the thief (Kuczynski). The existence of such a relationship indicated that Kuczynski initiated all approaches and that petitioner was at most a mere purchaser with no further involvement. A mere purchaser is not liable in the fashion of a thief nor as a conspirator. The newly discovered evidence, therefore, was substantive proof that petitioner did not conspire with Kuczynski nor instigate the thefts to any degree. The characterization of the evidence as merely impeaching was clearly erroneous.

c. The Failure To Conduct An Evidentiary Hearing

The failure to conduct a hearing in this case was antithetical to the notion that the criminal process is a continuing search for truth. The District Court was required to conduct a hearing to judge the demeanor of agent Comer when confronted with the newly discovered evidence and to ascertain whether the evidence in this context would result in the revelation that a collusive relationship existed between Comer and Kuczynski. The existence

of such a relationship was exculpatory with respect to petitioner because it negated testimony by Kuczynski that petitioner instigated the thefts. As importantly, a court as a rule should conduct a hearing when it is informed that newly discovered evidence has disappeared from within its chambers where it had been placed under seal. This Court should fashion a rule which requires a hearing in this circumstance to assure that there are no lapses in the vigilance which is necessary to maintain the appearance of integrity respecting all judicial acts. It should be noted in this regard that we do not question the integrity of the jurist from whose chambers the piece of paper disappeared. The sole issue is with respect to reasons why others might have surreptiously removed the piece of paper. We believe that the District Court's indifference stems exclusively from its view that the evidence was merely impeaching and therefore insufficient to warrant a new trial.

Reasons For Granting The Writ

Point I

CERTIORARI SHOULD BE GRANTED FOR THE PURPOSE OF ISSUING A STATEMENT THAT CONSTRUCTION OF FED.R.CRIM.PROC. 33 TO PRECLUDE A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE WHERE THE NEW EVIDENCE IS MERELY IMPEACHING IS VIOLATIVE OF THE FIFTH AMENDMENT RIGHT TO DUE PROCESS AND THE FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION. SINCE IMPEACHMENT EVIDENCE MAY HAVE AS GREAT AN IMPACT ON THE OUTCOME OF TRIAL AS ANY OTHER FORM OF. EVIDENCE THERE IS NO RATIONAL BASIS FOR THE HERETOFORE ACCEPTED RESTRICTION UPON THE SCOPE OF THE RULE.

The majority of federal circuits, including the Third Circuit in which this case was decided, have adopted an irrational construction of **Fed.R.Crim. Proc. 33** which precludes a new trial on the ground of newly discovered evidence where the evidence profferred by the movant consists exclusively of impeachment evidence. This rule is apparently premised upon the principle that impeachment evidence is of a lesser quality than other forms of evidence. The rule precludes a new trial due to discovery of such evidence without regard to the

probative value of the evidence. The premise for this construction of the rule is faulty at best and clearly specious when viewed in light of common experience. Impeachment evidence may under appropriate circumstances determine the outcome of the trial just as any other form of evidence. Therefore, any construction of the rule which excludes impeachment evidence has the potential to deny a particular defendant due process and to cause unequal applications of the law. Succinctly stated, there is no basis, consistent with due process and equal protection, to deny new trials to defendants solely on the basis of the generic classification of the form of newly discovered evidence which is proffered. The Constitution requires that the evidence be analyzed and a determination made as to its impact without regard to its generic classification. Since the end sought is a reliable verdict, any evidence which impacts on that ultimate interest must be scrutinized. The lower court's denial of petitioner's motion for a new trial exclusively on the ground that the evidence is impeaching violated petitioner's rights to equal protection of the law and to due process. This Court must terminate the arbitrary

and irrational limitation placed on **Fed.R.Crim. Proc. 33.** Justice demands no less.

i.

Prevailing Law As Presently Constituted

Pursuant to **Fed.R.Crim.Proc. 33,** a defendant may move for a new trial on the ground of newly discovered evidence. To prevail on such a motion, the majority of the federal circuits require that the defendant establish five requirements: (a) the evidence must in fact be newly discovered; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved and (e) it must be such that on a new trial, the newly discovered evidence would probably produce an acquittal. **United States v. Herman, 614 F.2d 369, 371 (3 Cir. 1980); United States v. Rocco, 587 F.2d 144, 146 (3 Cir. 1978)** (emphasis added). **Cf. United States v. Lee, 513 F.2d 423 (D.C. Cir. 1975); United States v. Eldred, 588 F.2d 746 (9 Cir. 1978); United States v. Wallace, 578 F.2d 735 (8 Cir. 1978), cert. den. Mitchell v. United States, 439**

U.S. 898 (1979); United States v. Krasny, 607 F.2d 840 (9 Cir. 1979), cert. den. 100 S.Ct. 1337 (1980); United States v. Jackson, 579 F.2d 553 (10 Cir. 1978), cert. den. 439 U.S. 981 (1979); United States v. Zicree, 605 F.2d 1381 (5 Cir. 1979), cert. den. Kaufman v. United States, 100 S.Ct. 1656 (1980); United States v. Ellison, 557 F.2d 128 (7 Cir. 1977), cert. den. 434 U.S. 965 (1978); United States v. Frye, 548 F.2d 765 (8 Cir. 1977); United States v. Hagerty, 561 F.2d 1197 (5 Cir. 1977); United States v. Cardarella, 588 F.2d 1204 (8 Cir. 1978); United States v. Allen, 554 F.2d 398 (10 Cir. 1977), cert. den. 434 U.S. 836 (1978); Brach v. United States, 542 F.2d 4 (2 Cir. 1976); United States v. Johnson, 596 F.2d 147 (5 Cir. 1979); United States v. Plum, 558 F.2d 568 (10 Cir. 1977); United States v. Pellegrino, 470 F.2d 1205 (2 Cir. 1972), cert. den. 411 U.S. 918 (1972); United States v. Barrett, 505 F.2d 1091 (7 Cir. 1974); United States v. Harris, 462 F.2d 1033 (9 Cir. 1972); United States v. Cozzetti, 469 F.2d 684 (9 Cir. 1972); United States v. Maestas, 523 F.2d 316 (10 Cir. 1975).

Thus, the majority of federal jurisdictions require that to qualify for a new trial on the ground

of newly discovered evidence a defendant must proffer evidence other than impeaching evidence. There is absolutely no basis for this artificial restriction. It is, however, currently the law of the land.

ii.

A Cogent Minority Of Opinions Have Recognized The Fallacious Premise Of Such A Limitation

In **United States v. Librach, 520 F.2d 550 (9 Cir. 1975)**, the Court acknowledged the critical impact which credibility has on the outcome of a trial. In **Librach**, the defendant subsequent to trial discovered evidence which disclosed that a favorable relationship existed between the government and a witness. The **Librach** Court stated:

> [There is] a need for reversal if the balance of the evidence... might reasonably have affected the jury's judgment on some material point...Applying this test to the instant facts it is significant that Fowler's credibility was crucial to the case against Librach and [the newly discovered evidence] might reasonably have affected the jury's judgment of his credibility. **[520 F.2d supra at 554].**

The Librach Court reversed the convictions due to its evaluation of the new evidence as having the capacity to materially impact upon the verdict rendered by the jury.

Similarly, in **United States v. Miller, 411 F.2d 825, 832 (2 Cir. 1969)**, the court reversed the defendant's convictions on the ground that the newly discovered evidence "could and very likely would have [been] the capstone of the [defense] attack on the crucial witness for the prosecution." Id. The **Miller** Court reversed even though it could not "confidently" predict the effect of the attack on the witness' credibility. The **Miller** Court was most concerned about the impact upon "one of the most valuable protections accorded the defendant by the Sixth Amendment - the possibility that the sanctity of the oath and effective cross-examination might lead [the witness] to recant...or least to admit doubt." Id. Cf. **United States v. Atkinson, 429 F. Supp. 880, 887 (E.D.N.C. 1977)** (Where truthfulness of testimony is essential to a finding of guilt and newly discovered evidence might have induced a reasonable doubt, a new trial must be granted).

iii.

The Instant Case

The newly discovered evidence in the instant case, similar to that in **United States v. Librach, supra,** had the capacity to impart to the jury that the government's key witnesses, viz. Comer and Kuczynski, had not testified truthfully respecting their knowledge and involvement in matters material to petitioner's guilt or innocence. Specifically, Kuczynski clearly lied with respect to the nature and extent of his involvement in procurement of F.B.I. documents. The newly discovered evidence would have revealed that he was privy to documents over a much greater time span then he claimed at trial. That evidence, viewed in light of the fact that Klimansky's employment at the F.B.I. terminated in 1972, also indicated that Kuczynski had yet another source of information. Comer falsely stated that the F.B.I. van was not operative in 1974 when Kuczysnki told Weingartner of its use. That denial raises the spectre that Comer testified falsely to guard against disclosure that Kuczynski was not a private operator instigated to steal documents but was an undercover operative whose function was to lure petitioner and others into the alleged scheme.

At a minimum, proof that Kuczynski was in business in 1974 destroyed the theory that petitioner instigated the thefts. The newly discovered evidence, therefore, had the capacity to place the facts as adduced at trial into a perspective which was exculpatory of petitioner.

Significantly, the District Court conceded that the evidence proffered by petitioner had probative value. The Court stated:

> I think it is agreed that the existence of the piece of paper corroborating Weingartner detracting from the testimony of Comer and Kuczynski is corroborative of Weingartner and impeaching of the other two. The tape would essentially be the same thing. [TM29].

However, since the Court viewed the evidence as "merely impeaching", it denied the motion. We submit that the Court was required to review the newly discovered evidence to determine whether it would have altered the outcome of trial. The Court was not at liberty to base its decision on the generic classification of the evidence. Its decision to do such denied petitioner due process and equal protection of the law. Evidence of a lesser quality which is classified in a different generic context would have entitled another defendant to a fair

consideration of his cause. This result is unfair and antithetical to constitutional norms. See Shortino v. Wheeler, 531 F.2d 938 (8 Cir. 1976).

Point II

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE MISCLASSIFICATION BY THE DISTRICT COURT OF PETITIONER'S EVIDENCE AS IMPEACHMENT EVIDENCE. THE EVIDENCE PROFFERED BY PETITIONER INDICATED THAT GOVERNMENT WITNESSES TESTIFIED FALSELY AND WOULD HAVE SUBSTANTIVELY IMPACTED UPON THE JURY'S FINDINGS RESPECTING PETITIONER'S CULPABILITY.

The District Court misclassified the evidence proffered by petitioner as "mere" impeachment evidence. The newly discovered evidence submitted to the court substantively impacted upon petitioner's culpability for the offense and extended in its probative value far beyond the scope of mere impeachment. The government's theory was that defendant instigated thefts of F.B.I. documents. The evidence proffered by petitioner indicated both that the government's witnesses testified in perjurious fashion and that there may have existed some favorable relationship between Kuczynski and the F.B.I. during the period of time when Kuczynski

was peddling documents. These facts do not merely contradict the government's witnesses but tend to negate any hypothesis as to petitioner's culpability.

i.

The Larrison Test And Its Applicability To The Instant Case

When newly discovered evidence indicates that government witnesses have testified falsely, a secondary test is applicable to the determination as to whether a new trial is warranted in addition to the general test respecting such evidence. See Point I, Part i. This standard, embodied in **Larrison v. United States, 24 F.2d 82, 87 (7 Cir. 1928)**, has three components: (1) a determination as to the truthfulness of the testimony; (2) a determination as to whether its exclusion would result in a different verdict and (3) a determination as to whether the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial. The **Larrison** Test was applicable below and should have led to the grant of a new trial to petitioner.

The newly discovered evidence in the instant case indicated that Comer and Kuczynski testified falsely with respect to issues critical to a finding of guilt at trial, viz. Kuczynski's ability to procure F.B.I. documents and the nature of his relationship to that agency. Kuczynski's relationship to the F.B.I. was of pivotal significance to any characterization of petitioner's involvement. Accordingly, the falsity of such testimony clearly would have affected the outcome of trial. At this juncture, we note that since the District Court misclassified the evidence proffered by petitioner, it made no findings under the **Larrison** Test. For the purposes of this petition, we assume the falsity of the testimony. Moreover, since the evidence relates to the government's two key witnesses, we must also assume that without it the jury would have reached a different conclusion. Further, it is also a fair assumption that without the newly discovered evidence petitioner was unable to meet the false testimony. In this context, we note that the falsity of Comer's testimony was absolutely established by the tape which was not deciphered until four years after trial.

ii.

False Testimony Respecting Material Issues Constitutionally Mandates The Grant Of A New Trial

In **United States v. Lipowski**, 423 F.Supp. 864 (D.N.J. 1976), the defendants were granted a new trial on the ground of newly discovered evidence where it was demonstrated that the evidence would have impeached the government's major witness' credibility in a manner which was likely to have resulted in a different verdict. The **Lipowski** Court stated that "newly discovered evidence which proves the key witnesses' perjury [must result in a new trial to prevent] a mockery of justice and a denial of the fundamental fairness of our judicial system." **Id. at 867.** Similarly, in **Carran v. Delaware, 259 F.2d 707 (3 Cir. 1958)**, the Court stated that "the false testimony of a detective [such as that in the instant case] is sufficient to cause a defendant's trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness." **Id. at 710.*** **Cf. United States v. Myers, 484 F.2d 113,**

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* We espouse the view that with respect to the false testimony of a government agent, the falsity of such testimony may never be dismissed as harmless on the ground that it is collateral.

118 (3d Cir. 1973) (A new trial should be ordered so that the government may present its case free of erroneous testimony).

III.

Summary

There is a subtle distinction between evidence which merely impeaches and evidence which indicates that a witness has testified falsely. Impeachment evidence detracts from the credibility of a witness' account, either with respect to the sufficiency of his recollection or his ability to perceive events. The evidence proffered by defendant, particularly the tape, indicated that testimony given by the government's witnesses was false. The testimony counteracted by the newly discovered tape and the piece of paper was essentially the government's entire case. Therefore, absent proper classification and consideration of the evidence leading to a new trial, defendant will have been denied both fundamental fairness and basic justice.

Point III

CERTIORARI SHOULD BE GRANTED TO ESTABLISH THE RULE OF LAW THAT A COURT HAS NO DISCRETION WITH RESPECT TO WHETHER TO CONDUCT A HEARING WHERE IT IS INFORMED THAT NEWLY DISCOVERED EVIDENCE WAS LOST, STOLEN OR DESTROYED WHILE UNDER SEAL AND IN THE COURT'S POSSESSION.

Even under ordinary circumstances, in deciding whether to grant a new trial, a court is required to conduct a thorough inquiry. See United States v. Persico, 339 F.Supp. 1077 (E.D.N.Y. 1972). Cf. Johnson v. United States, 207 F.2d 314, 322 (5th Cir. 1953). In this case, the court confronted the extraordinary circumstance of evidence having disappeared which was previously placed under seal and deposited in the court's chambers. In such a case, a court has no discretion with respect to whether it should conduct a hearing. The court and the integrity of its chambers must be absolved of any doubts as to the innocent nature of the disappearance. In this context, we observe that we do not doubt that the court did all that was required of it to safeguard the documents. Nevertheless, the evidence was lost from within the court's chambers.

The court's vigilant safekeeping of the evidence notwithstanding, the high regard which the general populace holds for the judiciary and its integrity requires that the court do all that it can to ensure that others have not invaded the sanctity of its chambers with the specific purpose to sabatoge petitioner's cause of action. The sole means to accomplish this end is to conduct a hearing wherein the probative value of the evidence is fully explored by examination of the witnesses to whom the evidence relates. In short, a hearing would explore the circumstances surrounding the disappearance of the evidence and would "show more clearly whether there is or is not credible evidence discovered since trial which should call for the granting of the petitioner's motion for a new trial." See Lyles v. United States, 272 F.2d 910, 912 (5th Cir. 1959). Cf. Remmer v. United States, 347 U.S. 227, 229-230 (1953).

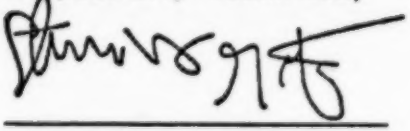
We submit that the court was without discretion in regard to the holding of a hearing. The disappearance of the evidence "poisoned the water in this reservoir and the reservoir cannot be cleansed without first draining it of all impurity...

[courts] must see that the waters of justice are not polluted." Mesarosh v. United States, 352 U.S. 1, 14 (1956). In this context, we emphasize that "the untainted administration of justice [must] remain] one of the most cherished aspects of our institutions" and the doing of justice [must] be made so manisfest that only irrational or perverse claims of its disregard can be asserted." id. To ensure that the doing of justice was manifest in this case, the District Court was required to conduct a hearing.

Conclusion

For all the foregoing reasons, the writ of certiorari should be granted to review the final judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

By: 

STEVEN H. GIFIS
Attorney for Petitioner -
John DiGilio

Of Counsel And On The Petition

Steven H. Gifis
Alan Dexter Bowman

DATED: August 18, 1981

APPENDIX

APPENDIX A

Supreme Court of the United States

No.A-57

JOHN DiGILIO,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 18, 1981

/s/William J. Brennan, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 21st day of July, 1981

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2840

UNITED STATES OF AMERICA

Appellee

v.

JOHN DI GILIO, JOHN GRILLO, HARRY LUPO, PETER SZWANDRAK, GEORGE KUCZYNSKI, IRENE (KLIMANSKY) KUCZYNSKI

JOHN DI GILIO, Appellant

Appeal From the United States District Court
For the District of New Jersey
D.C. Criminal No. 74-00314-01

Submitted Under Third Circuit Rule 12(6)
April 21, 1981

Before: HUNTER, SLOVITER, Circuit Judges, and STAPLETON,* District Judge

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*Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation

APPENDIX B

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred:

1) in failing to require a new trial where newly discovered evidence revealed the false testimony of key government witnesses on material facts; and

2) by abusing its discretion in failing to conduct a full evidentiary hearing on the disappearance of defense evidence while in the court's custody,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/J.H. III
JAMES HUNTER, III,
Circuit Judge

Attest:

s/S.M.
Sally Mrvos, Clerk

Dated: May 20, 1981

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (Filed November 17, 1980)

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA :

Criminal No. 74-314

v. :

JOHN DiGILIO, et al. : ORDER

This matter having been opened to the Court on the motion of John DiGilio, through counsel John Noonan appearing for an Order granting a new trial on the ground of newly discovered evidence pursuant to Fed.R.Cr.Proc. 33, in the presence of the United States Attorney for the District of New Jersey (Samuel Rosenthal, Assistant U.S. Attorney, appearing) and the Court having considered (1) the briefs of the parties; (2) the affidavits and certifications of Larry Bronson, John R. Schwartz, Roger Lowenstein and George Weingartner, and (3) the arguments of counsel, and for good cause shown:

IT IS on this 17th day of November, 1980,

ORDERED that the motion for a new trial is hereby denied.

APPENDIX C

s/H.C.M.

H. CURTIS MEANOR
Judge, U.S. District Court

FILED

NOV 17 1980

8:30 s/A.W.L.

ANGELO W. LOCASCIO

APPENDIX D

CONSTITUTION

Amend. 5

AMENDMENT V-CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

CONSTITUTION

Amend. 14

AMENDMENT XIV-CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at

APPENDIX E

any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.